U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TODD HARRISON and U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE, ROGUE RIVER NATIONAL PARK, Grants Pass, Ore.

Docket No. 96-4; Submitted on the Record;
Issued June 17, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's temporary position of forestry technician ending December 24, 1994, fairly and reasonably represented his wage-earning capacity; (2) whether the Office properly suspended any entitlement to further compensation benefits based on his refusal to submit to a directed examination.

On September 13, 1989 appellant, a 29-year-old forestry technician, sustained an injury at work while climbing trees to collect Ponderosa pine cones. Appellant had a history of a minor back injury eight years earlier, from which he had recovered.[1] The circumstances of the new injury involved reaching and moving heavy limbs to collect the cones. He was off work one day, and obtained treatment on the next day from Dr. John Shonerd, an osteopath and family practitioner. Dr. Shonerd diagnosed a shoulder and thoracolumbar strain, and treated appellant with nonsteriodal antinflammatories. He reported that x-rays on September 15, 1989 were normal, but continued to treat appellant twice per month for persistent complaints of pain. Under claim number A14-246731, the Office accepted appellant's claim for a lumbar strain on September 13, 1989. The Office subsequently rejected a separate claim for further back pain due to a fall at work on October 29, 1989, based on the lack of immediate medical treatment.[2]

Due to the terms of his employment, appellant worked 180 days per year with a new appointment each year, with winter months off from work.[3] Accordingly, appellant stopped

[1] Under claim number A14-165064 the Office accepted that appellant sustained a mid-back strain on June 15, 1981, with no time lost from work. Upon development of the current claim for a back injury, the Office noted that the record of claim number A14-165064 had been destroyed.

[2] Under claim number A14-251651, the Office denied appellant's claim for an injury due to a fall at work on October 29, 1989. However, later the Office combined the two claims, claim numbers A14-251651 and A14-24631 into one claim under the initial claim for an injury on September 13, 1989.

[3] While appellant worked seasonally, his employment was not automatic. As such, he was considered a

work November 21, 1990. During the period he was off work, Dr. Shonerd pointed out that repeat x-rays showed no evidence of any abnormality, including a degenerative process or congenital condition. Appellant was evaluated Dr. Cornelia Byers, a Board-certified internist and physiatrist, who reported that a bone scan and electromyogram (EMG) were normal. Dr. Byers diagnosed a probable right thoracic facet syndrome which she felt was improving. She referred appellant for physical therapy treatments twice per week. The physical therapy treatment notes document the presence of a left scoliosis condition, not previously addressed by Dr. Shonerd or Byers.

Appellant obtained a new offer of employment beginning on April 16, 1990. He continued bimonthly evaluations with Dr. Shonerd, who recommended that appellant use caution in the amount of force he exerted in his forestry technician position, to avoid aggravation of symptoms. Based on a May 7, 1990 report from Dr. Shonerd, the Office approved a one-year health club membership.[4] While appellant advised Dr. Shonerd of periodic aggravations, he did not file separate claims for every aggravation. He did file a claim for a flare-up pain on July 25, 1990, the third day he was riding a tractor. The Office assigned appellant's new claim for pain due to riding a tractor to claim number A14-255691. In September 1990 appellant advised Dr. Shonerd of further pain due to lifting logs and carrying a shoulder backpack of fertilizer. He resumed physical therapy treatment and stopped work for one week during October 1990. While he was off work, he obtained an evaluation by Dr. John A. Melson, a Board-certified neurologist, who found a lack of evidence of an injury other than a strain and diagnosed a chronic dorsal strain with residual myofascitis.[5] Dr. Peter A. Gant, a Board-certified physiatrist, who evaluated appellant three weeks later, noted that a repeat EMG was negative. Dr. Gant concurred with the diagnosis of myofascial syndrome and noted that appellant's left leg symptoms were attributable to a myofascial pain syndrome. Appellant's position ended on November 17, 1990.

In January 1991 the Office accepted under claim number A14-255691, appellant's claim for a lumbar strain from riding a tractor on July 25, 1990, and combined claims A14-246731 with A14-255691 into the latter claim which became the master file. Appellant continued to obtain physical therapy treatment twice per week. Following a review by Dr. Shonerd of a job description of appellant's job duties, appellant was provided with a new 180-day assignment on March 10, 1991.[6] After one month, appellant filed a claim for aggravation of pain from hiking into steep terrain. Appellant did not stop work at that time, but continued to report intermittent aggravation of pain due to certain work activities. In August 1991 Dr. Shonerd reported that appellant was disabled from his regular forestry technician duties, and that appellant was

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temporary employee hired for seasonal work, as opposed to a seasonal employee.

[4] The record indicates that pursuant to appellant's requests, appellant's health club membership was renewed yearly until the Fall of 1994.

[5] In his report, Dr. Melson referred to a prior stab wound in the left thoracic region, occurring in 1981.

[6] As in previous years, appellant was assigned to the wildlife crew, which consisted of 80 percent calling or tracking spotted owls and 20 percent work with improvement projects. His duties required him to wear a backpack weighing 10 pounds on day trips and 40 pounds on overnight trips, with some amount of stooping, bending and crawling on his stomach. On March 7, 1991 Dr. Shonerd approved the job offered to appellant.

restricted from lifting more than 30 pounds or prolonged activity in one position. Under claim number A14-265629, later combined with claim A14-255691, the Office accepted appellant's claim for a thoracic strain due to walking on steep terrain on April 16, 1991. Appellant's position ended on October 31, 1991.

In the Spring of 1992 appellant began treatment with Dr. Michael O'Connell, a clinical psychologist.[7] Appellant began his new assignment on April 13, 1992, in a primarily sedentary position.[8] After one week appellant reported to the psychologist, his complaints about increased pain from extended sitting. After three months, Dr. Shonerd reported appellant's complaints of aggravation of pain from sitting and he referred appellant for further testing. Dr. Stephen J. Cook, a Board-certified radiologist, reported that a computerized tomography (CT) of the thoracic spine performed on July 13, 1992 was normal. Dr. Thomas M. Ewald, a family practitioner and an emergency room physician, diagnosed a chronic thoracic strain with a myofascial component and mild preexisting thoracic rotary scoliosis. He noted on examination findings which included four out of five on the Waddell's test. Dr. Ewald recommended biofeedback treatment with pain management. Due to the lack of work, appellant was off work for one month in November 1992, but was permitted to work up until Christmas as part of his 180-day term of employment.

During the period appellant was off work, the Office referred appellant to Dr. Dr. Darrell Weinman, a Board-certified orthopedic surgeon associated with the Medford Orthopedic Group. Dr. Weinman provided a history of a prior back injury for which appellant received chiropractic treatment.[9] He noted that the x-rays from September 15, 1989 showed some narrowing of T-6 and T7, which he interpreted as underlying degenerative disc disease. Dr. Weinman reported objective findings of some fullness in the muscles in the right thoracic region. He diagnosed a right-sided thoracic sprain aggravating the underlying degenerative disc disease and noted that appellant could work without restriction.

Appellant was offered another primarily sedentary job, beginning on March 22, 1993. After three days, he was off work for one week due to lack of work, then returned to work on April 4, 1993. Following review of the medical evidence by an Office medical adviser and receipt of an April 19, 1993 report by Dr. Shonerd, the Office found a conflict in the medical evidence between the opinions of Drs. Shonerd and Weinman.[10] Dr. Douglas Morrison, a

[7] The record shows that the Office authorized payment of treatment for up to 12 visits, and that appellant went to approximately 5 sessions.

[8] Appellant was assigned to answer the telephones, perform computer work, dispatch workers during emergencies, drive into forest areas to patrol areas, occasional lifting of boxes not weighing more than five to 20 pounds, delivering mail to the office staff, creating and changing sings for the office, selling items to visitors to the state park, organizing and keeping map information, and bending over to reach into the cupboards. He was permitted one and one-half hour per day to obtain exercise through participating in the Wellness Program.

[9] Dr. Weinman noted that the back injury occurred in 1988 when appellant heard his back pop, and that the two to three months of chiropractic manipulation improved his condition, which became worse again during the Spring of 1989.

[10] The Office medical adviser who reviewed the medical evidence on March 30, 1993 found that further development was necessary to evaluate the presence of scoliosis, not documented by the CT scan, as well as the

Board-certified orthopedic surgeon selected to resolve the conflict in medical opinion, evaluated appellant on October 11, 1993. Dr. Morrison diagnosed a myofascial pain syndrome based on the trigger points and overall picture of the pain pattern, which he related to the cumulative effects of the employment injuries after his prior back injury in the early 1980's had resolved. He noted that appellant could sit for eight hours per day, stand or walk for six hours per day, perform bending, lifting, or sitting activities for two hours per day, and lift between 20 and 50 pounds. Based on Dr. Morrison's reports, the Office amended the acceptance of appellant's claim to include a myofascial pain syndrome resulting from the chronic thoracic sprain.[11]

Appellant stopped work on December 27, 1993 due to the expiration of the term of his employment that year. Based on the amended acceptance of his claim for myofascial syndrome, the Office paid appellant wage-loss compensation for the period between December 27, 1993 to April 24, 1994. He returned to work April 25, 1994 in the primarily sedentary position, he had performed the two prior years. The Office also referred appellant to the vocational rehabilitation program for assistance in obtaining other employment. The initial vocational rehabilitation counselor noted appellant's desire to obtain vocational assistance in obtaining a degree in landscape architecture or graphic arts. The counselor noted however, that appellant had transferable skills for current employment without further degrees. The counselor reported that appellant could perform positions including information clerk, warehouse worker, landscape laborer, and his current position of forestry technician. The record indicates that appellant was not satisfied with a predominantly sedentary job.[12] He obtained a report from Dr. Shonerd who recommended limiting appellant's sitting to twice per day at 50-minute stretches. Appellant was assigned another vocational rehabilitation counselor, who in September 1994, identified four positions of administrative clerk, cashier, office clerk and general clerk, and performed market surveys for each position. The vocational rehabilitation counselor indicated that the positions were available.

Appellant resigned from his position on September 21, 1994 on the grounds of alleged "discrimination, harassment and abusive employment practices."[13] By letter dated October 14, 1994, the employing establishment reported that appellant's position was still available until

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possible presence of non-organic factors suggested by at least one physician who reported results on a Waddell's test. The Office medical adviser recommended a panel consisting of a psychological, orthopedic and neurological consultation to obtain answers to the discrepancies and conflicts in the medical evidence.

[11] In a March 7, 1994 response to an inquiry from the Office, Dr. Morrison noted that there were no laboratory findings to confirm a diagnosis of myofascial pain syndrome, but that he diagnosed the condition on the basis of the trigger points and the overall pain pattern. He restricted appellant permanently from repetitive lifting and bending, and noted that those activities could be performed 25 percent of the time.

[12] Appellant described the willingness of the employing establishment to have him remain in a light duty assignment, but noted that he did not have the desire to remain in a receptionist-type of job.

[13] A progress report from Dr. Shonerd indicates that appellant reported that appellant resigned, because he felt he was being harassed as a result of his old thoracic injury, and that another employee had been hired on a permanent basis Dr. Shonerd noted that appellant alleged the person was hired to replace him, and he recommended counseling to assist with appellant's frustrations with the current loss of his job.

Christmas and that it would be working to fill the position with someone else. Appellant returned to work on October 30, 1994, pursuant to a letter from the Office advising him of his responsibility to report to available suitable work.

By letter dated November 17, 1994, appellant requested information on his renewal of his health club membership and the Office's determination on his wage-earning capacity. Appellant worked until the expiration of his term of employment on December 23, 1994. In January 1995 he requested wage-loss compensation. The record indicates that the employing establishment advised the Office in February 1995, that it did not intend to rehire appellant.

By decision February 21, 1995 the Office found that appellant's position from April 25 to September 21, 1994 fairly and reasonably represented his wage-earning capacity. The Office amended the statement of accepted facts to indicate his work history. On March 10, 1995 the Office referred appellant, together with the amended statement of accepted facts and a list of questions to Orthopedic Consultants for evaluation with Dr. Michael Marble, a Board-certified orthopedic surgeon and Dr. David Rich, at the Medford Office. The Office advised appellant that the purpose of his evaluation, scheduled on April 13, 1995, was to determine both the relationship between his present condition to the injury and the extent and degree of any residuals of the employment injury. The Office advised appellant of his right to have his physician present, with such expense paid by him, and advised appellant of the consequences for failure to attend the scheduled evaluation.

By letters seeking congressional assistance dated March 30, 1995, which appellant forwarded to the Office by facsimile transmission on April 7, 1995, appellant objected to the second opinion evaluation and stated that he would not attend the evaluation. Appellant stated that there was business arrangement between Drs. Weinman of Medford Orthopedic Group who performed the second opinion evaluation on February 11, 1993, and Drs. Rich and Marble of Orthopedic Consultants. He noted that Orthopedic Consultants subleted space from Medford Orthopedic Group at 840 Royal Avenue, Suite 1, Medford Oregon, which was the location of his prior February 11, 1993 evaluation and the place of the scheduled April 13, 1995 evaluation. He noted that Dr. Weinman's nurse was a close friend of his prior supervisor, with whom he had experienced several conflicts, and that Dr. Weinman had been the only physician of many, who attributed his current condition to a preexisting condition. Appellant also requested the renewal of his health club membership and payment of counseling he was obtaining on account of his continued pain syndrome and his lack of work. He also objected to the lack of immediate response to his November 1994 request on payment for further health club privileges and an expected wage-earning capacity determination. Appellant felt that a second opinion evaluation was a method of stalling.

In response, the Office sent a facsimile on April 11, 1995, which appellant indicated he received on that date. The facsimile noted that the examination was a medical consultation for the District Medical Adviser and was not meant to be a an impartial medical evaluation for a conflict of medical opinion. The Office advised appellant that he was expected to attend the examination, which was intended for the purpose of determining his entitlement to medical care for his employment injury.

Appellant did not attend the examination on April 13, 1995.

By decision dated April 17, 1995, the Office found appellant in obstruction of the scheduled examination and that he forfeited any potential entitlement to compensation until his obstruction ceased. The Office noted that the decision was final with respect to the suspension of any potential further benefits based on his obstruction. The Office also denied appellant's request for renewal of his health club membership, and his request for reimbursement to counseling treatment.

By letter dated May 26, 1995 appellant claimed that he did not receive the full materials which he requested under the Freedom Of Information Act. In his letter, appellant alleged that he was treated improperly by the Office and the employing establishment, in surveillance activities and suggestions that he was faking, or suggestions from the employing establishment that he not be allowed to remain indefinitely. By letter dated June 23, 1995, appellant requested reconsideration of the Office's decision. Appellant contended that the Office did not respond timely to his request on November 17, 1994, that the referral to the second opinion physician was improper based on the reasons previously stated, that the explanation for the referral from the Office was vague, and that he had previously submitted on October 16, 1992 a prescription signed by Dr. Shonerd for an indefinite period of YMCA membership. He also maintained that his need for counseling was due to his employment injury, and that he had obtained counseling throughout the period of his treatment. Appellant submitted a current report dated April 17, 1995 from Dr. Shonerd, together with additional information including business records which showed that Dr. Rich was the owner and treasurer of his consulting business, and that he was advised by the receptionist that Orthopedic Consultants subleted space from the Medford Orthopedic Group. He also noted that his supervisor's wife was good friends with the nurse of Dr. Weinman, and that the supervisor had entertained the nurse the weekend before February 8, 1993. Appellant also submitted information from a grievance he had filed against his supervisor, Greg Stahl, for a change in the schedule on November 8, 1994, which in effect removed his lunch hour and other breaks because of the lack of relief during the weekend hours, and he documented the conversations at around that time, relating to the supervisor's displeasure with appellant and the lack of interest to keep him. Appellant also documentation relating to his YMCA membership, including the October 31, 1991 prescription which noted "YMCA membership - one year- renewable indefinitely."

By decision dated August 2, 1995 the Office denied appellant's request for a

review of the merits of his case. The Office addressed appellant's contentions concerning the referral to Drs. Marble and Rich and found that the referral was proper.

The Board finds that the Office properly determined that appellant's temporary position of forestry technician ending December 24, 1994, fairly and reasonably represented his wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."[14] Wages actually earned are the best measure of a wage-earning capacity and,

[14] 5 U.S.C. § 8115(a).

in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's capacity, must be accepted as such measure.[15] Office procedures direct that a wage-earning capacity determination based on actual wages, be made following 60 days of employment.[16] The procedures provide for a retroactive determination where an employee has worked for at least 60 days and the work stoppage following that date was not due to the employment-related condition.[17]

Appellant was hired each year to perform work on a temporary 180-day basis, usually beginning in April and extending into November or December. While appellant related a history of problems at work subsequent to his employment injury, the record does not establish that appellant's work stoppage was due to his employment injury. Following his resignation in September 1994 for reasons other than his work injury, he was permitted to return to work to complete his term that year. With the exception of the break in work from September 21 until October 30, 1994, due to his resignation, he had worked that year since April 25, 1994. Accordingly, the retroactive wage-earning capacity determination was proper. While appellant had indicated that he anticipated that the Office would evaluate his wage-earning capacity pursuant to a selected position, the Board notes that as stated above, actual earnings are considered the best measure of an injured employee's earning capacity.[18]

The Board finds that the Office properly suspended any further compensation based on his refusal to submit to a directed examination.

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[15] G*regory A. Compton*, 45 ECAB 154 (1993) (where appellant had actual earnings as a data entry clerk for over a year at a wage rate substantially equal to or greater than the position held at the time of injury, the Office properly determined that he had no loss of wage-earning capacity) ; *James D. Champlain*, 44 ECAB 438 (1993) (where appellant's earnings as a clerk for over two years represented his wage-earning capacity, despite his work stoppage on account of a nonemployment-related myocardial infarction).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (December 1993); *See William D. Emory*, 47 ECAB ____ (Docket No. 94-881, issued February 14, 1996).

[17] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter2.814.7(e) (December 1995).

[18] Where the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, the wage-earning capacity is determined with regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage earning capacity in his or her disabled condition. 5 U.S.C. § 8115(a); s*ee Mary J. Calvert*, 45 ECAB 575 (1994); *Samuel J. Chavez*, 44 ECAB 431 (1993); *Keith Hanselman*, 42 ECAB 680 (1991). The Office offers vocational rehabilitation services to assist the employee in placement with the previous employer in a modified position or, if not feasible, developing an alternate plan which may include vocational testing, training and/or placement services. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813 (December 1993). Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report which lists two or three jobs which are medically and vocationally suitable for the employee, and proceed with information from a labor market survey to determine the availability and wage rate of the position. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993).

Section 8123 (a) of the Act authorizes the Office to require an employee who claims disability as a result of federal employment, to undergo a physical examination as it deems necessary.[19] The determination of the need for an examination, the type of examination, the choice of locale, and the choice of medical examiners are matters within the province and discretion of the Office.[20] The regulations governing the Office provide that an injured employee "shall be required to submit to examination by a U.S. Medical Officer or by a qualified private physician approved by the Office as frequently and at such times and places as in the opinion of the Office may be reasonably necessary."[21] The only limitation on this authority is that of reasonableness.[22] The Act provides that "[i]f an employee refuses to submit to or obstruct an examination, his right to compensation under this subchapter is suspended until the refusal or obstruction stops."[23] The Office procedures provide for a period of 14 days within which to present, in writing, his or her reasons for the refusal or obstruction.[24]

The Board finds that appellant was provided with the requisite 14-day period to state his reasons for refusing the examination, and the Office properly evaluated appellant's reasons. The Office advised appellant by letter dated March 10, 1995 of the scheduled evaluation with Dr. Marble, a Board-certified orthopedic surgeon and Dr. Rich, a neurologist, on April 13, 1995. The Office had previously obtained a second opinion evaluation from Dr. Weinman, a Board-certified orthopedic surgeon, at the same location where Drs. Marble and Rich were located. Appellant advised the Office on April 7, 1995, five days before the scheduled evaluation, that he objected to the evaluation based on the leasing arrangement between Dr. Weinman of Medford Orthopedic Group and Drs. Marble and Rich of Orthopedic Consultants. Appellant also objected to the fact that Dr. Rich was an owner and business of the group. He also speculated about the effect of the friendly relationship between his supervisor's wife and Dr. Weinman's nurse.

As stated above, the Office may refer appellant for evaluations as it deems necessary. Office procedures provide that a second opinion is required where the employee is disabled for work six months after disability for work begins, and is advisable for other reasons, where the evidence is not clear on the nature and extent of the impairment resulting from the injury.[25] The Office determined in this case, that the basis of appellant's continued symptoms was unclear, and in view of the work stoppage, requested further evaluation of appellant's condition. The Board finds that while the Office had accepted appellant's condition a year earlier for myofascial pain disorder, a further evaluation on the nature and extent of appellant's employment-related

[19] 5 U.S.C. § 8123(a).

[20] *Corlisia L. Sims (Smith)*, 46 ECAB 172, 180 (1994); *James C. Talbert*, 42 ECAB 974, 976 (1991).

[21] 20 C.F.R. § 10.407(a).

[22] *See* cases cited at *supra*, note 21; *See also William G. Saviolidis*, 35 ECAB 283, 286 (1983); *Joseph W. Bianco*, 19 ECAB 426, 428 (1968).

[23] 5 U.S.C. § 8123 (d).

[24] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (April 1993).

[25] *Id.*, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.3(a).

condition following his cessation from work is reasonable. With respect to appellant's objections to Drs. Rich and Marble, the Board has held that the ability to participate in selecting a referral physician accrues only with respect to the referral of an impartial medical examiner to resolve a conflict in the medical opinion.[26] The fact that a second opinion physician is owner of the consulting group does not render him or her unable to perform an accurate and complete second opinion evaluation. Neither does the fact that there is a leasing arrangement between a prior second opinion physician and the current second opinion physician or panel, disqualify the current physician or panel. As the referral to Drs. Marble and Rich as a panel was appropriate, and appellant was advised that his reasons for refusing to submit to the examination were not valid, the Board finds that the Office properly suspended any entitlement to further compensation based on the obstruction of the examination.

The decisions of the Office of the Workers' Compensation Programs dated February 21, April 17, and August 2, 1995 are hereby affirmed.

Dated, Washington, D.C.
June 17, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[26] *Eva M. Morgan*, 47 ECAB ____ (Docket NO. 94-1022, issued February 20, 1996).